Supreme Court, U.S.
FILED

041670 JUN 8 - 2005

OFFICE OF THE CLERK

No. :_____

In the

Supreme Court of the United States

YAAKOV SPRITZER,

Petitioner-Pro Se,

-against-

MENDEL HERSHKOP, YOSEF GOLDMAN,
SHMUEL HEBER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether it was error for the Court of Appeals, in violation of my constitutional rights under the Due Process Clause of the Fourteenth Amendment, to refuse to entertain my appeal because I had purportedly "voluntarily consented" to the dismissal of my federal RICO claim, where the "consent" was not voluntary, as I was compelled by the directive of the district court, which did not advise me, a pro se plaintiff, that my "consent" would result in the complete termination of all my appellate rights?

2. Whether it was error for the Court of Appeals, in direct conflict with prior precedent, to hold that it lacked jurisdiction to entertain my appeal, where my "consent" to the formal dismissal was intended to expedite the Court's review of a prior order which had in effect dismissed my Complaint?

LIST OF PARTIES BELOW

In addition to the parties listed in the caption of this Petition, the Circuit Court judgment listed Machne Menachem Inc. as Plaintiff-Counter-Defendant, and Meir Hershkop, Aaron (Lelli) Hershkop, Shneur (Gadi) Hershkop, and Levi Hartman as Defendants-Counter-Claimants. However, those parties were not affected by the District Court's judgment or the Circuit Court's judgment and thus do not appear in the caption of this Petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, 1a), is reported at 105 Fed. Appx. 314. The opinion of the district court (App., infra, 4a), appears at 2003 U.S. Dist. LEXIS 2804.

JURISDICTION

The Court of Appeals' judgment is dated August 6, 2004. A timely petition for en banc rehearing was denied by Order dated March 10, 2005. App., infra, 6a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Proceedings in the Trial Court

Machne Menachem, Inc. "(Machne") is a summer camp located in Pennsylvania which was created to primarily serve the needs of Lubavitcher children in the Crown Heights section of New York City. I was the principal organizer and operator of the camp and a principal source of funding for the camp's activities. This action was initially brought by Machne against, among others, three of the initial board of directors of Machne – Mendel Hershkop, Shmuel Heber and Yosef Goldman. As the fourth original director of Machne, I was added to the action as an additional plaintiff to resolve an issue of "standing".

The complaint asserted RICO claims against the defendants in addition to claims under state law. I sought a preliminary injunction against the defendants,

who, while claiming to remain directors of Machne, had set up a competing summer camp called Ohr Menachem and were engaging in a campaign of intimidation against Machne's officers and directors in an attempt to drive Machne out of business.

After the conclusion of a hearing on my request for a preliminary injunction, Judge Glasser of the district court issued an Order dated July 1, 1997, in which he found as fact, among other things, that defendants Hershkop, Heber and Goldman established a new summer camp in direct competition with Machne, "in flagrant violation of fiduciary duty by those defendants claiming to still be directors of the plaintiff". The court issued a preliminary injunction against defendants from committing any act of violence or harassment against Machne's officers and employees, from entering the camp without authorization, and from interfering in the camp's administration.

At the beginning of the proceedings, Judge Glasser stated that he wanted to conduct an evidentiary hearing to determine the membership of the board before he determined my RICO claim. It was Judge Glasser's apparent belief that if the defendants remained directors of Machne, my RICO claims against them should be dismissed. (The Court's position has always been confusing to me. Why should the issue of whether the defendants were directors of Machne be a defense to the claim that their conduct in threatening and intimidating Machne's

officers and employees constitutes a RICO violation?)

The Court conducted hearings on the issue of who were the directors of Machne in September-October 2001. On December 7, 2001, Machne was compelled to file a petition in bankruptcy in the Bankruptcy Court in Pennsylvania, which caused the hearings to be suspended. The hearings resumed in May 2002. At that point I was proceeding pro se.

Judge Glasser's Order dated October 18, 2002 determined issues which were pure state issues. Among other things, the Court found that Goldman, Hershkop and Heber were still directors of Machne. The Court so held even though those defendants admitted during the trial that they breached their fiduciary duty by founding and operating the new directly competing camp Ohr Menachem which placed in jeopardy Machne's financial ability to survive, and Goldman and Heber admitted at trial that they had ceased being directors of Machne in 1995.

The October 18th Order stated that the "parties are also advised that the Court will entertain a motion to discontinue or dismiss the RICO cause of action to which this purely ancillary state matter is an appendage". Upon the court's "invitation", Machne made a motion to dismiss the RICO claims. The court issued an order dated January 31, 2003 which dismissed the RICO claims. Judge Glasser specifically noted in the January 31, 2003 Order that he had "invited the parties to move to dismiss the RICO claim" (emphasis added).

Respectfully, I was proceeding pro se. From my understanding, when a Judge "invites" a party to dismiss a claim, or instructs the parties that he will "entertain a motion to discontinue or dismiss", that is an instruction that the parties should make such a motion to dismiss or the Court will dismiss the claim itself and impose penalties upon the parties for failing to make the motion. At that point, I realized that there was no point in continuing my RICO claim as Judge Glasser had already indicated that he would dismiss the claim and had, in effect, directed me to make a motion for voluntary dismissal. It was also my understanding of the law, as discussed infra, that my consent to dismissal of the RICO claim would expedite review of the October 18, 2002 Order.

In an effort to comply with Judge Glasser's directive, I submitted a letter dated February 3, 2003, in which I stated I had no objection to dismissal of the case. The Court dismissed the RICO claims with prejudice by Order entered February 11, 2003. I appealed to the Court of Appeals from the February 11, 2003 Order, also bringing up for review the October 18, 2002 and January 31, 2003 Orders.

B. Proceedings in the Circuit Court

In its August 6, 2004 Order, the Second Circuit Court of Appeals stated in pertinent part as follows:

"Spritzer appeals from the order of the U.S.

District Court for the Eastern District of New York, entered February 11, 2003 (`the February 11th order'), which, with Spritzer's consent, granted Machne's motion to dismiss with prejudice the federal law claims and declining to exercise supplemental jurisdiction over the common law claims. In fact, Spritzer raises no real challenge to this final order. Rather, he attempts to appeal from the district court's findings of fact and conclusions of law, dated October 18, 2002 (`the October 18, 2002) (`the October 18th order")....

"In the October 18th Order, the district court determined only that defendants Mendel Hershkop, Shmuel Heber, and Yosef Goldman were currently members of Machne's board of directors. The October 18th Order did not actually or effectively dispose of Spritzer's RICO claims. Indeed, at oral argument, Spritzer insisted that his RICO claims survived the October 18th order and that his consent to the February 11th order was a product of factors unrelated to the October 18th order. Under these circumstances, we lack jurisdiction to entertain this appeal. See Palmieri v. Defaria, 88 F.3d 136, 139-140 (2d Cir. 1996)".

REASONS FOR GRANTING THE PETITION

The Dismissal of My RICO Claim was "With Prejudice" And Was Not Voluntary. The Court of Appeals Deprived Me of My Due Process Rights In Refusing To Hear My Appeal.

Respectfully, the Court of Appeals' reliance upon Palmieri v. Defaria as reason for its refusal to hear my appeal, was in error. In Palmieri, the Court stated that a plaintiff who seeks and receives a voluntary dismissal without prejudice generally cannot maintain an appeal from the order of dismissal. The rationale is as follows: "Because a plaintiff may reinstate his action regardless of the decision of the appellate court, permitting an appeal is clearly an end-run around the final judgment rule" (88 F.3d at 140). Here, among other things, the dismissal of my claims was with prejudice and therefore the rationale set forth in Palmieri does not apply. The Court's application of Palmieri to this case is clearly erroneous and a deprivation of my due process because unlike the plaintiff in Palmieri, I cannot simply reinstate my action.

Furthermore, and with all respect, the Court's conclusion that it lacked jurisdiction to hear my appeal because I purportedly voluntarily consented to the dismissal of my RICO claims is based on a misunderstanding of the facts. My consent to the

February 11th order cannot in any way be deemed voluntary. In effect, Judge Glasser directed me, a pro se litigant, to consent to the dismissal order, without warning me that the Court of Appeals would construe my "consent" as a voluntary forfeiture of any further appellate rights. I consented to the dismissal only to comply with Judge Glasser's directive, without it ever occurring to me that the Court of Appeals would construe this as a voluntary termination of my further appellate rights.

Judge Glasser was fully aware that as of May 2002, I was proceeding pro se, without the benefit of counsel. On October 18, 2002, Judge Glasser issued his order finding that defendants Goldman, Heber and Hershkop remained directors of Machne and stated:

> "The parties are also advised that the Court will entertain a motion to discontinue or dismiss the RICO cause of action to which this purely ancillary state matter is an appendage."

Prior to this statement by the Judge, I had not made any motion to dismiss the RICO claim. Thus, the directive in the October 18th Order that the parties move to dismiss the RICO cause of action originated with Judge Glasser. It was not my idea to dismiss the RICO claim.

In compliance with Judge Glasser's directive, Machne moved to dismiss the RICO claims with prejudice, and the Court granted the motion in its

Order dated January 31, 2003. Judge Glasser specifically noted in the January 31, 2003 Order that he had "invited the parties to move to dismiss the RICO claim" (emphasis added).

When a Court indicates in an Order that it will "entertain" a motion to dismiss, and reiterates in another Order that it "invites" such a motion to dismiss, the plaintiff's consent to the dismissal of the claim, made at the Court's behest, cannot be deemed "voluntary". At no point was I, as a pro se plaintiff, advised that this would result in the termination of my appellate rights.

As a pro se appellant, it is simply inexplicable to me that the district court could issue a series of orders with catastrophic effects upon me from which there can be no appeal. The Court's rulings forced the defendants and me to attempt to operate as co-directors of Machne, despite defendants' history of overt hostility and even physical violence towards me. What is more, after Judge Glasser issued his October 18, 2002 decision, defendants removed me from the board despite Judge Glasser's urging in the decision that we all work together as directors of Machne. Further, there has been a cloud cast over the validity of Machne's contracts, its mortgages, and the legitimacy of legal proceedings it instituted including the bankruptcy proceeding. I cannot believe that the American jurisprudence system would permit the deprivation of my rights to appellate review when I, as a pro se plaintiff, had no idea that Judge Glasser's

"invitation" to dismiss the RICO claim would result in the complete deprivation of my right to appeal those adverse orders. For the above reasons, the Petition should be granted.

The Court of Appeals Failed to Apply Federal Precedent In Declining to Hear My Appeal. My Consent to Dismissal Was Intended to Expedite Review of the October 18th Order.

In Empire v. World-Wide Volkswagen Corp., 814 F.2d 90, 94 (2d Cir. 1986), the Court stated that where a voluntary dismissal is with prejudice, an appeal may be prosecuted where the plaintiff's "solicitation of the formal dismissal was designed only to expedite review of [a prior] order which had in effect dismissed [plaintiffs'] complaint." See also, Chappelle v. Beacon Communications Corp., 84 F.3d 652 (2d Cir. 1996).

In this case, Judge Glasser's October 18 order, which determined that the defendants remained directors of Machne, effectively terminated, in that Court's view, my RICO claim. The Court of Appeals' statement, that "The October 18th order did not actually or effectively dispose of Spritzer's RICO claims", is contradicted by Judge Glasser's statements. Judge Glasser indicated in the October 18th order that in his view, the case was already over. He therefore "invited" the parties to move to dismiss the RICO claim. I consented to the February 11th order because,

among other reasons, in my understanding of the law, that would allow the Court of Appeals to review the October 18th Order which would not otherwise be reviewable.

Respectfully, at no time did I state during the oral argument that my "consent to the February 11th Order was a product of factors unrelated to the October 18th order." The Court of Appeals apparently misapprehended what was stated at oral argument. At the argument, I was asked by one of the Judges as follows:

> "...[Y]ou're appealing from the order that found that these three persons named were still on board....That made it in essence impossible for you to pursue your RICO claim and so you dismissed it with prejudice, so that you could come up here and argue this issue. Is that right?"

I responded, "In essence."

This case clearly fits within the exception set forth in Empire v. World-Wide Volkswagen Corp., 814 F.2d 90 (2d Cir. 1986) and Chappelle v. Beacon Communications Corp., 84 F.3d 652 (2d Cir. 1996). The Court of Appeals manifestly erred in failing to apply applicable federal precedent in dismissing my appeal, providing an additional reason to grant certiorari.

The Court of Appeals' statement in its decision, that "Spritzer raises no real challenge to this final order [the February 11, 2003 Order]", is also erroneous. In my Appellant's Brief to that Court, I argued among other things that Judge Glasser erred in issuing the February 11 final order without first deciding my motion pursuant to Rule 37 to strike Goldman's pleadings for his spoliation of evidence. I further argued that it was error for the Court to find that the defendants remained directors of Machne despite, among other things, their flagrant violation of their fiduciary obligation by opening a competing camp and their spoliation of critical evidence. Thus, I did in fact raise serious challenge to the February 11 final order. This presents yet another compelling reason to grant review of the Court of Appeals' refusal to determine the merits of my appeal.

CONCLUSION

For the foregoing reasons the Petition should be granted.

Respectfully submitted,
Yaakov Spritzer,
Petitioner Pro Se
June 2005

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 6th day of AUGUST two thousand and four.

Present: ROSEMARY S. POOLER,
ROBERT D. SACK,
REENA RAGGI,

Circuit Judges.

YAAKOV SPRITZER,

Plaintiff-Appellant,

MACHNE MENACHEM INC.,

Plaintiff-Counter-Defendant,

-v- (03-7266)

MEIR HERSHKOP, AARON (LELLI) HERSHKOP, SHNEUR (GADI) HERSHKOP, LEVI HARTMAN, MENDEL HERSHKOP, and YOSEF GOLDMAN,

Defendants-Counter-Claimants,

SHMUEL HEBER,

Defendant-Counter-Claimant-Appellee.

Appearing for Plaintiff-Appellant: Yaakov Spritzer, pro se, Brooklyn, NY.

Appearing for Defendant-Counter-Claimant-Appellee: Shmuel Heber, pro se, Brooklyn, NY.

Appeal from the United States District Court for the Eastern District of New York (I. Leo Glasser, Senior District Judge).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court, dated February 11, 2003, be and hereby is AFFIRMED.

The instant case concerns a dispute over the ownership and control of Machne Menachem, Inc. ("Machne"), a New York not-for-profit corporation. Yaakov Spritzer, in his own behalf and purportedly on behalf of Machne, filed a complaint alleging that the defendants had illegally removed him from Machne's board of directors. Federal jurisdiction was based upon the assertion of claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18

U.S.C. § 1962 et seq. The complaint also asserted a variety of common law claims.

Spritzer appeals from the order of the U.S. District Court for the Eastern District of New York, entered February 11, 2003 ("the February 11th order"), which, with Spritzer's consent, granted Machne's motion to dismiss with prejudice the federal law claims and declining to exercise supplemental jurisdiction over the common law claims. In fact, Spritzer raises no real challenge to this final order. Rather, he attempts to appeal from the district court's findings of fact and conclusions of law, dated October 18, 2002 ("the October 18th order"). Both parties to the instant appeal have moved to strike each others' briefs, which motions are denied.

In the October 18th order, the district court determined only that defendants Mendel Hershkop, Shmuel Heber, and Yosef Goldman were currently members of Machne's board of directors. The October 18th order did not actually or effectively dispose of Spritzer's RICO claims. Indeed, at oral argument, Spritzer insisted that his RICO claims survived the October 18th order and that his consent to the February 11th order was a product of factors unrelated to the October 18th order. Under these circumstances, we lack jurisdiction to entertain this appeal. See Palmieri v. Defaria, 88 F.3d 136, 139-140 (2d Cir. 1996).

Accordingly, this appeal is hereby **DISMISSED**.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By:S/ _____
Richard Alcantara, Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

MACHNE MENACHEM. INC. and
YAAKOV SPRITZER,

Plaintiffs,

-against-

ORDER
97-CV-2550(ILG)

MENDEL HERSHKOP, SHMUEL
HEBER, YOSEF GOLDMAN and
MEIR HERSHKOP,

Defendants.

----------x

GLASSER, United States District Judge:

Following the motion of plaintiff Machne Menachem, Inc. for dismissal with prejudice of the RICO claim, granted on January 31, 2003, plaintiff Yaakov Spritzer has submitted a letter dated February 3, 2003. Spritzer, who is pro se, has "no objection to dismissal of the case" which is understood to mean that he joins in Machne Menachem's motion. Therefore, the RICO claims are dismissed with prejudice, and all remaining state law claims are dismissed pursuant to 28 U.S.C. § 1367(c).

Spritzer also asks this Court to resolve an outstanding application, pursuant to Federal Rule of Civil Procedure 37, to strike Joseph Goldman's pleadings for spoliation of evidence relating to a list of certain campers. At the hearing,, the Court granted plaintiffs' request to draw an inference in their favor, but reserved decision on the request to strike the pleadings. Given the resolution of that hearing and the

federal claims in this case, that additional remedy would serve no purpose and the application is moot.
SO ORDERED.

Date: February___, 2003
Brooklyn, New York

S/_____
I. Leo Glasser
United States District Judge

Copies of the foregoing were sent on this day to:

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S, COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

AMENDED ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the l0th day of MARCH two thousand five.

Present:-
Hon. ROSEMARY S. POOLER, DKT. NO,: 03-7266

Hon_ ROBERT D. SACK,

Hon. REENA RAGGI,

A petition for panel rehearing and a petition for rehearing en bane having been filed herein by the appellant Yaakov Spritzer Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en bane has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie , Clerk

By: s/_____
Motion Staff Attorney

Yaakov Spritzer

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